IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

THURSDAY, THE 12TH JULY 2007 / 21ST ASHADHA 1929

AR.No. 23 of 2004()

PETITIONER:

MALAYALAM INDUSTRIES LTD., PRESENTLY
HAVING ITS REG.OFFICE AND PLACE OF BUSINESS AT
MERMAID COMPLEX, VYTTILA, KANAYANNUT TALUK,
ERNAKULAM DIST., REP. BY ITS MANAGING DIRECTOR
THOMAS GOERGE, AGED 50, MERMAID COMPLEX, VYTTILA,
KANAYANNUR TALUK, ERNAKULAM DISTRICT.

BY ADV. SRI.RAJIV ABRAHAM GEORGE
SRI.EAPEN ABRAHAM GEORGE

RESPONDENTS:

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1. M/S. KIRLOSKAR MC QUARY PVT.LTD.,
PRESENTLY HAVING ITS REGISTERED OFFICE AT NO.1239,
HADAPSAR, INDUSTRIAL ESTATE, PUNE-411 013,
REPRESENTED BY ITS EXECUTIVE DIRECTOR.

2. M/S. MC QUARY ITALIA,
S.S. NETTUNENSE KM 12+300
CECHINA (ROMA), ITALY-00040.

3. M/S. MC QUAY INTERNATIONAL,
13600, INDUSTRIAL PARK BOULEVARD,
MINNEAPOLIS, MN.55441, USA.

(R2 AND R3 STRUCK OUT FROM THE PARTY ARRAY
VIDE ORDER DT.13/6/2007 IN I.A.2/2007)

R1 BY ADV. SRI.N.N.SUGUNAPALAN (SR.)
SRI.M.P.KRISHNAN NAIR
SRI.K.A.ABDUL SALAM
SRI.V.RAMACHANDRAN
SRI.V.MANOJ KUMAR

THIS ARBITRATION REQUEST HAVING BEEN FINALLY HEARD ON 11/07/2007, THE COURT ON 12/07/2007 DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN, J.

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A.R.No.23 OF 2004

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Dated this the 12th day of July, 2007.

O R D E R

This is an application seeking an order appointing an arbitrator in terms of Annexure-A1 tender document filed on the assertion that the said document contains the arbitration clause and that in pursuance to Annexure-A1, Annexure-A6 letter sent by the petitioner to the third respondent refers to the tender document which contains the arbitration clause.

2. This case is initially filed arraying three respondents of which one is a private limited company with registered office at Pune while the other two are companies outside India. By order dated 13-6-2007, I.A.2/2007 filed by the petitioner was allowed whereby respondents 2 and 3 were struck off from the party array at the risk of the petitioner. This leaves the petitioner and the first respondent, an Indian company on the array of parties.

3. Annexure-A3 is stated to be the offer made by the first respondent. There is dispute between the parties as to whether the document with the caption “terms and conditions of sale”, placed along with Annexure-A3, is really part of Annexure-A3. In spite of the assertion of the contesting respondent that there is no such offer or agreement, no further materials are placed on record by the petitioner.

4. Be that as it may, even I were to assume that the terms and conditions placed on record by the petitioner as part of Annexure-A3 contain the arbitration clause in question, a reading of Annexure-A3 as a whole would show that the nature of the contract between the parties is not one in which an arbitration could be had between the petitioner and the first respondent without the junction of the second respondent. This is particularly because, a perusal of Annexure-A3 would show that the offer for the supply in question is regulated by the terms that payment

shall be made in favour of the deleted second respondent and the letter of credit must be confirmed by the Italian bank. The purchase order was also to be placed in favour of the deleted second respondent, but to be sent to the first respondent. The issues between the first respondent as an agent of both or any of the deleted respondents 2 and 3 would be a matter which would be directly and substantially in issue in any arbitration proceedings between the petitioner and the first respondent and it will be improper to order an arbitration without the junction of the deleted respondents 2 and 3.

5. If the deleted respondents are also to be on the array of parties, if at all there is an arbitration agreement, the jurisdiction of the Chief Justice of this Court or the nominee in that regard, would not be available to make an order as sought for, in view of Section 11(12)(a) of Arbitration and Conciliation Act, 1996.

In the aforesaid circumstances, I find no ground to issue any order as sought for and this A.R. is dismissed without prejudice to the right, if any, of the petitioner to move for appropriate relief in accordance with law, including the Arbitration and Conciliation Act, 1996.

Sd/-
THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

Sha/-